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STANDING STILL IN THE ROBERTS COURT

Jonathan H. Adler[†]

In 2007, *The New York Times* reported “limiting the ability of plaintiffs to bring or appeal lawsuits” had emerged as an early “theme” of the Roberts Court.¹ *The Wall Street Journal* concurred, reporting “the biggest change under Chief Justice Roberts might not involve who wins on the merits” but “who gets through the courthouse door in the first place.”² Reviewing some of the Court’s initial decisions, Dean Erwin Chemerinsky commented that “the effect of many of the Court’s decisions was to close the courthouse doors.”³ More colorfully, Professor Judith Resnick labeled the October 2006 term—the first full term since the confirmations of Chief Justice John Roberts and Associate Justice Samuel Alito—as “the year they closed the courts.”⁴

It is admittedly too soon to reach any definitive conclusions about the Roberts Court. The current Justices have yet to sit together for four full terms. An early consensus is emerging nonetheless that one effect of the Roberts Court is to make it more difficult for prospective plaintiffs to have their day in federal court.

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¹ Linda Greenhouse, *In Steps Big and Small, Supreme Court Moved Right*, N.Y. TIMES, July 1, 2007, at A1.

² Jess Bravin, *Court Under Roberts Limits Judicial Power; Conservative Shift Sets Hurdles for Litigants*, WALL ST. J., July 2, 2007, at A1.

³ Erwin Chemerinsky, *Turning Sharply to the Right*, 10 GREEN BAG 2D 423, 437 (2007); see also Charles Whitebread, *The Conservative Kennedy Court—What a Difference a Single Justice Can Make: The 2006–2007 Term of the United States Supreme Court*, 29 WHITTIER L. REV. 1, 5 (2007) (identifying “the Court’s determination to close off access to courts” as a “theme” of the October 2006 Supreme Court term).

⁴ Greenhouse, *supra* note 1 (quoting Professor Judith Resnik, Yale Law School).

In some areas the Roberts Court does appear to have reduced access to the courts, as the commentators claim. Through its first three terms the Court accepted arguments that federal law preempts state tort litigation almost unerringly.⁵ The Court interpreted relevant statutory provisions and statutes of limitations narrowly to preclude litigation⁶ and declined requests to authorize previously undiscovered causes of action.⁷ As Professor Gene Nichol observed, this is a court that interprets statutory limits on litigation strictly and is reluctant to recognize new implied rights of action or adopt new, broadened interpretations of statutory bases for suits against private firms.⁸ Yet the Court has not uniformly ruled against access to federal courts, having opened the door to climate change litigation⁹ and habeas claims by Guantanamo detainees.¹⁰

Those areas in which the Court has limited citizen access to courts have something in common: a statutory foundation. Where the Court has erected or enforced barriers to private litigants seeking access to federal courts, it has grounded its decisions in the relevant federal statutes. The decisions in these cases all turn on statutory language and legislative intent.¹¹ As a consequence, nearly any of these decisions could be readily overturned by legislative action—and some may well be. Among its first actions in 2009, Congress enacted legislation to overturn the Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co.*¹² that barred Lilly Ledbetter's pay discrimination claim. Additional legislation overturning other decisions limiting private litigation, including the Court's holding that federal law preempts state law tort claims against medical device manufacturers in *Riegel v. Medtronic, Inc.*,¹³ may follow.¹⁴

⁵ See Erwin Chemerinsky, *The Roberts Court at Age Three*, 54 WAYNE L. REV. 947, 968 (2008) ("Every preemption case decided so far by the Roberts Court has been decided in favor of finding preemption."). But see *Wyeth v. Levine*, 129 S. Ct. 1187 (2009); *Altria Group, Inc. v. Good*, 129 S. Ct. 538 (2008); see also *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2619 (2008) (rejecting claim that punitive damages for oil spill were preempted by federal Clean Water Act).

⁶ *John R. Sand & Gravel Co. v. United States*, 128 S. Ct. 750 (2008); *Bowles v. Russell*, 551 U.S. 205 (2007); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5.

⁷ *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 128 S. Ct. 761 (2008).

⁸ Gene R. Nichol, *The Roberts Court and Access to Justice*, 59 CASE W. RES. L. REV. 821 (2009).

⁹ *Massachusetts v. EPA*, 549 U.S. 497 (2007).

¹⁰ *Boumediene v. Bush*, 128 S. Ct. 2229 (2008).

¹¹ The claim here is not that all of these decisions were correctly decided, but rather that the respective holdings were all justified on statutory grounds.

¹² 550 U.S. 618 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5.

¹³ 128 S. Ct. 999 (2008).

Congress does not retain the same ability to modify the Court's holdings in all "access to justice"-type cases. Specifically, Congress has limited ability to second-guess judicial decisions concerning Article III standing. In the standing context, judicial limits on the ability of private parties to bring suit are often a matter of constitutional law.¹⁵ While Congress retains some ability to alter the bounds of standing on the margin, this authority is limited because the Article III standing requirement is, at its core, a constitutional rule. Congress may tinker on the edges, but it cannot confer standing on parties that fail to meet the underlying constitutional requirements in a given case.

Because standing decisions are more insulated from legislative revision than other sorts of "access to justice" cases, focusing on the Roberts Court's approach to standing may allow us to refine our assessment of the Roberts Court. Specifically, it may illuminate whether the underlying "theme" of the Court's work in this area is limiting access to the federal courts, or something else. For example, if the Court construes statutory jurisdictional provisions quite narrowly, but does not alter constitutional bases for jurisdiction, the Court is less "shutting the courthouse door" than it is deferring to Congress's role as the judiciary's doorman. Insofar as the Court has not restricted Article III standing, this suggests that the Court is less hostile to "access to the courts" than it is reluctant to define the contours of such access itself, leaving to Congress the job of defining and delimiting citizen rights to sue.

This Article offers a preliminary look at the standing jurisprudence of the Roberts Court. This is obviously a work in progress, as the Roberts Court presents an evolving subject of study. At this point, however, the Roberts Court has yet to tighten the requirements of Article III standing. To the contrary, insofar as the Roberts Court has altered the law of standing, it has made it easier for at least some litigants to pursue their claims in federal court. The Court's decisions denying standing have largely reaffirmed prior holdings, warts and all. By comparison, some of the Court's decisions on standing, most

¹⁴ See David Ingram, *Democrats Take Aim at Supreme Court Decisions*, NAT'L L.J., Aug. 10, 2009, available at <http://www.law.com/jsp/article.jsp?id=1202432902339>; David Ingram, *Specter Proposes Return to Prior Pleading Standard* posting at Blog of the Legal Times, July 23, 2009, <http://legaltimes.typepad.com/blt/2009/07/specter-proposes-return-to-prior-pleading-standard.html>

¹⁵ In some cases, particularly those involving prudential standing, the question of standing can turn on legislative enactments rather than constitutional requirements. See, e.g., *Bennett v. Spear*, 520 U.S. 154 (1997) (finding plaintiffs had standing under "zone of interests" prudential standing doctrine due to congressional authorization of suit by "any person").

notably *Massachusetts v. EPA*¹⁶ and, to a lesser extent, *Sprint Communications Co. v. APCC Services Inc.*,¹⁷ have lowered the standing bar, perhaps quite significantly. Whatever else has transpired with regard to citizen “access to federal courts” in the first four years of the Roberts Court, standing for citizens to invoke the jurisdiction of federal courts remains in place.

I. STANDING IN THE COURT

The constitutional doctrine of standing seeks to determine whether an individual litigant has a sufficient stake in the outcome of a particular legal dispute so as to create a “case” or “controversy” subject to resolution by an Article III court. As colorfully explained by then-Judge Antonin Scalia, the standing inquiry asks of the party seeking to invoke the jurisdiction of a federal court “What’s it to you?”¹⁸

The specific requirements of Article III standing, as articulated by the Supreme Court, are quite familiar to any student of federal courts. As the Court explained in *Lujan v. Defenders of Wildlife*,¹⁹ and has repeated many times since,²⁰ the “irreducible constitutional minimum of standing” has three parts.²¹ First, the “plaintiff must have suffered an ‘injury in fact,’” that is both “actual or imminent” and “concrete and particularized.”²² Second, there must be a “causal connection between the injury and the conduct complained of.”²³ Third, there must be a sufficient likelihood that the “the injury will be ‘redressed by a favorable decision.’”²⁴ Whether or not these requirements derive from a proper interpretation of the text of Article III, the requirement that a plaintiff have standing in order for there to be a question “of a Judiciary nature”²⁵ that can be resolved in federal court is cemented into the foundation of federal constitutional law. While there remains

¹⁶ 549 U.S. 497 (2007).

¹⁷ 128 S. Ct. 2531 (2008).

¹⁸ Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 882 (1983).

¹⁹ 504 U.S. 555 (1992).

²⁰ See, e.g., NE Fla. Chap. of Associated Gen. Contractors of Amer. v. City of Jacksonville, Fla., 508 U.S. 656, 663 (1993) (restating the minimum requirements of Article III standing articulated in *Lujan*); U.S. v. Hays, 515 U.S. 737, 742–43 (1995) (same); Bennett v. Spear, 520 U.S. 154, 162 (1997) (same); Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 102–03 (1998) (same); Friends of the Earth, Inc. v. Laidlaw Envtl Svcs, Inc., 528 U.S. 167, 180–81 (2000) (same).

²¹ *Lujan*, 504 U.S. at 560.

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 561 (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (1976)).

²⁵ See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 430 (Max Farrand ed., 1911) (discussion of how judicial power was limited to questions of a “Judiciary nature”).

a vibrant academic debate over the textual and historical provenance of the contemporary standing doctrine,²⁶ the basic contours of Article III standing find near universal assent on the bench.

While there is substantial agreement in the courts over the formal requirements of Article III standing—*injury*, *causation* and *redressability*—there is substantial disagreement over how these requirements should be applied. By most accounts *Lujan* adopted a particularly narrow and demanding view of standing's requirements—a “slash-and-burn expedition through the law of environmental standing” according to one justice.²⁷ Subsequent decisions, such as *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*²⁸ and *Federal Election Commission v. Akins*²⁹ adopted more lenient standards, recognizing less substantial or concrete injuries than *Lujan* suggested would be required. As a consequence, the law of standing sees frequent doctrinal shifts that alter the legal terrain without altering the underlying fundamentals.

There are several justifications for the standing requirement, such as the need to ensure sufficient adversity between the parties³⁰ and vindicate individual rights.³¹ The Supreme Court's standing jurisprudence over the past several decades, however, has grounded the standing requirement in the separation of powers. As Justice

²⁶ See, e.g., Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689 (2004); John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 1009 (2002); James Leonard & Joanne C. Brant, *The Half-Open Door: Article III, the Injury-in-Fact Rule, and the Framers' Plan for Federal Courts of Limited Jurisdiction*, 54 RUTGERS L. REV. 1 (2001); Bradley S. Clanton, *Standing and the English Prerogative Writs: The Original Understanding*, 63 BROOK. L. REV. 1001 (1997); Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163 (1992); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371 (1988); Raoul Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?*, 78 YALE L.J. 816 (1969); Louis L. Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033 (1968).

²⁷ See, *Lujan*, 504 U.S. at 606 (Blackmun, J., dissenting).

²⁸ 528 U.S. 167 (2000).

²⁹ 524 U.S. 11 (1998).

³⁰ See, e.g., Martin H. Redish & Andrianna D. Kastanek, *Settlement Class Actions, the Case-or-Controversy Requirement, and the Nature of the Adjudicatory Process*, 73 U. CHI. L. REV. 545 (2006) (stating Article III's case or controversy requirement ensures adequate adversity between the parties). *But see* Richard A. Epstein, *Standing and Spending—The Role of Legal and Equitable Principles*, 4 CHAP. L. REV. 1, 46–47 (2001) (arguing ideological plaintiffs are likely to be sufficiently adverse to satisfy this concern); Scalia, *supra* note 18.

³¹ See, e.g., Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 HARV. L. REV. 297 (1979) (stating among the purposes of standing the proper representation of individuals and self-determination); *see also* Eugene Kontorovich, *What Standing Is Good For*, 93 VA. L. REV. 1663, 1664 (2007) (stating standing “prevent[s] the inefficient disposition of constitutional entitlements” and enables individuals to determine the best use of their own rights).

Sandra Day O'Connor stated in *Allen v. Wright*,³² "the law of Art. III standing is built on a single basic idea—the idea of separation of powers"³³—and this idea helps define the role of judiciary within the constitutional framework.³⁴ Indeed, the Court has gone so far as to declare that "[n]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies."³⁵

Whether or not eighteenth and early nineteenth century jurists recognized an implicit standing requirement in Article III, the roots of standing (and other contemporary justiciability doctrines) can be unearthed in the founding period. "The province of the court is, solely, to decide on the rights of individuals," Chief Justice John Marshall noted in *Marbury v. Madison*.³⁶ Such cases stand in contrast to those that are "political" in that "[t]hey respect the nation, not individual rights" and are entrusted to the elected branches.³⁷ Where the rights of individuals are at stake, the judiciary is within its element and properly exercises the authority of judicial review, even if that means second-guessing or over-ruling the actions of a coordinate branch. Yet when individual rights are not at stake, constitutional questions are properly left to the political branches, each of which has an independent obligation to uphold and enforce the Constitution.

Notably, this separation of powers justification was explicitly embraced by two of the current Justices—Chief Justice John Roberts and Associate Justice Antonin Scalia—before their respective nominations to the Court.³⁸ According to then-Judge Scalia, "the judicial doctrine of standing is a crucial and inseparable element" of the principle of separation of powers—a principle inherent in the structure of the Constitution itself.³⁹ Failure to observe these principles risks the "overjudicialization of the processes of self-governance."⁴⁰ Then-private attorney John Roberts likewise observed some years later that the doctrine of standing was "designed

³² 468 U.S. 737 (1984).

³³ *Id.* at 752.

³⁴ *Id.* at 750 (explaining how the "case or controversy" requirement "defines with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded").

³⁵ *Raines v. Byrd*, 521 U.S. 811, 818 (1997) (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 37 (1976)).

³⁶ 5 U.S. (1 Cranch) 137, 170 (1803).

³⁷ *Id.* at 166.

³⁸ See John G. Roberts, Jr., *Article III Limits on Standing*, 42 DUKE L.J. 1219, 1229 (1993); Scalia, *supra* note 18.

³⁹ Scalia, *supra* note 18, at 881.

⁴⁰ *Id.*

to implement the Framers' concept of 'the proper—and properly limited—role of the courts in a democratic society.'"⁴¹ As Roberts then explained, "By properly contenting itself with the decision of actual cases or controversies at the instance of someone suffering distinct and palpable injury, the judiciary leaves for the political branches the generalized grievances that are their responsibility under the Constitution."⁴²

Perhaps unsurprisingly, the Roberts Court generally—and the Chief Justice in particular—appear to have a "unique interest in standing cases."⁴³ As documented by Professors Lee Epstein, Andrew Martin, Kevin Quinn, and Jeffrey Segal, the percentage of cases involving standing has been "far higher" than in prior courts.⁴⁴ Over four percent of the 145 cases decided by the Roberts Court in its first two terms involved standing concerns. By comparison, during the Warren, Burger, and Rehnquist Courts, the percentage of standing cases fluctuated between 0.5 and just over 2 percent of the total cases.⁴⁵ This apparent increase in standing cases is perhaps even more notable as the Roberts Court is hearing significantly fewer cases per term than its predecessors, particularly the Warren and Burger Courts.

Since joining the Court, Chief Justice Roberts has written an opinion in all but three cases in which the Court addressed standing concerns with a signed opinion.⁴⁶ Chief Justice Roberts wrote the opinion for the Court finding the plaintiffs had standing in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*⁴⁷ and *Plains Commerce Bank v. Long Family Land and Cattle Co.*⁴⁸ He addressed the standing of parents to challenge race-conscious school assignment plans in his plurality opinion in *Parents Involved in Community Schools v. Seattle School District No. 1*,⁴⁹ and wrote the Court's opinion denying taxpayer standing in *DaimlerChrysler Corp. v. Cuno*.⁵⁰ This is unlikely to be accidental—the Chief Justice assigns

⁴¹ Roberts, *supra* note 38, at 1220 (quoting *Allen v. Wright*, 468 U.S. 737, 750 (1984)).

⁴² *Id.* at 1229.

⁴³ Lee Epstein et al., *The Bush Imprint on the Supreme Court: Why Conservatives Should Continue to Yearn and Liberals Should Not Fear*, 43 TULSA L. REV. 651, 663 (2008).

⁴⁴ *Id.*

⁴⁵ *See id.*

⁴⁶ The three cases were *Davis v. Federal Election Commission*, 128 S. Ct. 2759 (2008), *Hein v. Freedom from Religion Foundation, Inc.*, 127 S. Ct. 2553 (2007), and *Summers v. Earth Island Institute*, 129 S. Ct. 1142 (2009). In a fourth case, *Lance v. Coffman*, 549 U.S. 437 (2007), the Court issued a *per curiam* opinion.

⁴⁷ 547 U.S. 47 (2006).

⁴⁸ 128 S. Ct. 2709 (2008).

⁴⁹ 127 S. Ct. 2738 (2007).

⁵⁰ 547 U.S. 332 (2006). In this case, Justice Ginsburg wrote an opinion concurring in part and concurring in the judgment. *Id.* at 354–55 (Ginsburg, J., concurring in part and concurring in judgment).

opinion authors so long as he is on the prevailing side of a case. Chief Justice Roberts also wrote strongly worded dissents from the Court's conferral of Article III standing in *Massachusetts v. EPA*⁵¹ and *Sprint Communications Co. v. APCC Services, Inc.*⁵² Standing is clearly an issue close to the Chief Justice's heart.

As already noted, Chief Justice Roberts's interest in standing was clear before his confirmation to the Court. Though he rarely expressed public opinions about legal or political issues during his impressive career as an appellate litigator, he published a short article in the *Duke Law Journal* defending the Court's constriction of Article III standing in *Lujan v. Defenders of Wildlife*.⁵³ Like Justice Scalia before him, Chief Justice Roberts suggested that rigorous application of the "injury-in-fact" requirement keeps the courts within their appointed roles and safeguards the separation of powers. It is thus perhaps not surprising that standing has occupied such a large share of the Roberts Court's early docket—at least in comparison to previous Courts.

II. STILL STANDING

Whatever the consequences of the Roberts Court's decisions in other doctrinal areas for citizen "access to the courts," the net effect of its standing decisions has been to increase access, at least for some litigants in some sorts of cases. In most respects, however, the standing doctrine in the first few terms has stood still. Most standing decisions involve the relatively straightforward application of existing precedent. In two cases, however, the Court broadened standing to allow greater access to federal courts, even if only on the margins.

Most of the Roberts Court's standing decisions have been unanimous, reflecting the uncontroversial—and doctrinally inconsequential—effects of these decisions. In *Lance v. Coffman*,⁵⁴ for instance, the Court held unanimously, in a brief *per curiam* opinion, that four Colorado voters lacked standing to press an Elections Clause⁵⁵ challenge to a state constitutional provision limiting the frequency with which state officials may redraw

⁵¹ 549 U.S. 497 (2007).

⁵² 128 S. Ct. 2531 (2008).

⁵³ See Roberts, *supra* note 38.

⁵⁴ 549 U.S. 437 (2007).

⁵⁵ The "Elections Clause" provides that "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Place of choosing Senators." U.S. CONST. art. I, § 4, cl. 1.

congressional districts.⁵⁶ The voters' suit asserted the sort of "generalized grievance" long precluded from judicial review.⁵⁷ As the Court explained, the voters' only asserted injury was Colorado's alleged failure to comply with the Elections Clause, and a claim that a government failed to follow the law—without more—is insufficient to satisfy Article III. "This injury is precisely the kind of undifferentiated, generalized grievance about the conduct of government that we have refused to countenance in the past," the Court explained.⁵⁸ As a consequence, the claim was readily distinguishable from cases in which voters alleged more concrete harms to their interests, or in which private citizens sued as relators on behalf of the state.⁵⁹

The Court's holding in *DaimlerChrysler Corp. v. Cuno*⁶⁰ that state taxpayers lacked Article III standing to challenge a state's award of preferential tax credits to a local manufacturer was only slightly more consequential. For decades the Court had held that federal taxpayers lack Article III standing to challenge federal spending "simply because they are taxpayers."⁶¹ As the Court explained in *Frothingham v. Mellon*⁶² in 1923, a taxpayer's interest in the federal treasury is indistinct, "minute and indeterminable," and "the effect upon future taxation, of any payment out of the funds, so remote, fluctuating and uncertain" as to preclude the justiciability of taxpayer challenges to federal spending.⁶³ For the same reason, Chief Justice Roberts explained, a federal taxpayer would lack standing to challenge a tax expenditure, such as a tax credit or exemption; "In either case, the alleged injury is based on the asserted effect of the allegedly illegal activity on public revenues, to which the taxpayer contributes."⁶⁴

In *Cuno*, the Court held the argument against *federal* taxpayer standing to challenge federal appropriations or tax expenditures "applies with undiminished force to state taxpayers."⁶⁵ If state taxpayers are to challenge preferential tax policies in federal court, then they must assert some basis for standing beyond their status as taxpayers,⁶⁶ whether they claim the tax provisions at issue violate the

⁵⁶ *Lance*, 549 U.S. at 441–42.

⁵⁷ *Id.* at 439–40 (citing *Fairchild v. Hughes*, 258 U.S. 126 (1922) and *Ex parte Levitt*, 302 U.S. 633 (1937)).

⁵⁸ *Id.* at 442.

⁵⁹ *See id.*

⁶⁰ 547 U.S. 332 (2006).

⁶¹ *Id.* at 343.

⁶² 262 U.S. 447 (1923).

⁶³ *Id.* at 487.

⁶⁴ *Cuno*, 547 U.S. at 344.

⁶⁵ *Id.* at 345.

⁶⁶ *Id.* at 346.

Dormant Commerce Clause or any other structural constitutional provision.⁶⁷ While acknowledging the Court had created a limited exception for taxpayer standing to challenge legislative Establishment Clause violations in *Flast v. Cohen*,⁶⁸ Chief Justice Roberts explained that the injury in such cases is not to the litigant's interest in the federal Treasury. Rather, "the injury alleged in Establishment Clause challenges to federal spending" is "the very extract[ion] and spen[ding] of tax money in aid of religion alleged by the plaintiff."⁶⁹ As a consequence, *Flast* provided no precedent for challenging preferential tax credits. Even Justice Ginsburg, who concurred separately to state her disagreement with some of the more restrictive standing precedents of the past thirty years, accepted the "nonjusticiability of *Frothingham*-type federal and state taxpayer suits in federal court."⁷⁰

Yet the Roberts Court is hardly of one mind concerning standing. Four cases in particular reveal sharp divisions among the Justices on the application of Article III standing's requirements. *Massachusetts v. EPA*,⁷¹ *Sprint Communications Co. v. APCC Services, Inc.*,⁷² *Hein v. Freedom from Religion Foundation, Inc.*,⁷³ and *Summers v. Earth Island Institute*⁷⁴ were all 5–4 decisions. In two of these cases, *Massachusetts* and *Sprint*, the Court found Article III standing; in the other two it did not. The breakdown among the Justices remained consistent across these cases, with the Court's four most liberal Justices consistently voting to approve standing claims and the four most conservative Justices consistently in opposition. Only Justice Anthony Kennedy was in the Court's majority in all four cases, sometimes writing separately to qualify his position.⁷⁵ Here, as in other areas, Justice Kennedy is the median Justice whose views determine the outcome in close cases.⁷⁶

⁶⁷ See *id.* at 348.

⁶⁸ 392 U.S. 83 (1968).

⁶⁹ *Cuno*, 547 U.S. at 348 (alterations in original) (internal quotation marks omitted).

⁷⁰ *Id.* at 355 (Ginsburg, J., concurring).

⁷¹ 549 U.S. 497 (2007).

⁷² 128 S. Ct. 2531 (2008).

⁷³ 127 S. Ct. 2553 (2007).

⁷⁴ 129 S. Ct. 1142 (2009).

⁷⁵ This demonstrates the frequency with which Justice Kennedy has cast the deciding vote in Article III standing cases.

⁷⁶ See Lee Epstein & Tonya Jacobi, *Super Medians*, 61 STAN. L. REV. 37, 67 (2008) (describing Justice Kennedy as a "super median" justice). Justice Kennedy's ability to determine case outcomes has led some to call the Roberts Court the "Kennedy Court." See Chemerinsky, *supra* note 5, at 953–55 (describing Justice Kennedy's powerful influence as a member of the majority in 5–4 and 5–3 decisions since 2006); cf. Jonathan H. Adler, *Getting the Roberts Court Right: A Response to Chemerinsky*, 54 WAYNE L. REV. 983, 1008–11 (2008) (stating that the idea of a "Kennedy Court" is not a new concept).

The most consequential standing case of the Roberts Court thus far is *Massachusetts v. EPA*.⁷⁷ Indeed, *Massachusetts* is among the most consequential cases decided by the Roberts Court on any issue. *Massachusetts* loosened the requirements for Article III standing to challenge federal regulatory actions, both for state litigants and others seeking to allege agency failure to comply with relevant statutory requirements. More than any other, this case altered preexisting standing doctrine, and did so in favor of those seeking to invoke the jurisdiction of federal courts.

At issue in *Massachusetts* were whether the Environmental Protection Agency (“EPA”) had the authority to regulate carbon dioxide and other greenhouse gases as “pollutants” under the Clean Air Act and, if so, whether the EPA had properly declined to exercise such authority in rejecting a rulemaking petition submitted by several states and environmentalist groups. *Massachusetts* and the other petitioners sought to force the EPA to regulate greenhouse gas emissions from new motor vehicles under Section 202 of the Act so as to mitigate the threat of global warming. Yet before it could approve the petitioners’ claims, the Court had to first assure itself that at least one had Article III standing.

Climate change presents an interesting standing challenge. The Court has long held that federal courts lack jurisdiction to hear “generalized grievance[s]” that are “common to all members of the public.”⁷⁸ Thus, an Article III court lacks the jurisdiction to hear a naked claim that a government agency has failed to violate some provision of the law or, as noted above, that some portion of the federal Treasury was appropriated for an illegal purpose. Invoking the power of federal courts requires something more. In particular, it requires something that connects the allegedly wrongful act to a distinct harm suffered by the litigant.

At first blush, the general bar on hearing “generalized grievances” would seem to preclude hearing a claim predicated on an injury derived from a gradual warming of the Earth’s atmosphere. By definition, global climate change is a *global* phenomenon. The emission of greenhouse gases from motor vehicles in the United States or anywhere else contributes to *global* atmospheric

⁷⁷ 549 U.S. 497 (2007). See also Jonathan H. Adler, *Warming Up to Climate Change Litigation*, 93 VA. L. REV. IN BRIEF 63 (2007), <http://www.virginialawreview.org/inbrief/2007/05/21/adler.pdf>; Jonathan H. Adler, *Massachusetts v. EPA Heats Up Climate Policy No Less Than Administrative Law: A Comment on Professors Watts and Wildermuth*, 102 NW. U. L. REV. COLLOQUY 32 (2007), <http://www.law.northwestern.edu/lawreview/Colloquy/2007/20/LRColl2007n20Adler.pdf>.

⁷⁸ *United States v. Richardson*, 418 U.S. 166, 176–77 (1974) (quoting *Ex parte Lévit*, 302 U.S. 633, 634 (1937) (per curiam)).

concentrations of greenhouse gases that, in turn, have an effect on the *global* climate. The alleged harms from any resulting global warming would be visited upon the globe, a conclusion that would seem to preclude the existence of a “case or controversy” fit for judicial resolution under Article III.⁷⁹ Much like an individual taxpayer could not claim a judicially cognizable injury from the misuse of funds in the federal Treasury, an individual citizen of the planet could not claim a judicially cognizable injury from a slight alteration of the planetary thermostat. At the very least, a prospective plaintiff would have to identify an actual or imminent harm to a specific legally-protected interest resulting from such changes. Such attribution is very difficult. This is not to deny or disparage the potential consequences from climate change, but only to recognize the difficulty of finding a distinct, particularized injury resulting from global environmental phenomena.

The Commonwealth of Massachusetts sought to establish the requisite injury by focusing the Court’s attention on a specific potential consequence of global warming: sea-level rise.⁸⁰ Massachusetts submitted affidavits asserting that anthropogenic emissions of greenhouse gases, by contributing to global warming, increase the threat of global sea-level rise that would flood some portion of Massachusetts’s coast.⁸¹ These affidavits noted that a modest rise in sea-level had occurred over the course of the twentieth century—albeit some of which was due to natural causes—and estimated the future sea-level rise that could result if anthropogenic emissions of greenhouse gases continue unabated.⁸²

The focus on sea-level rise simplified the Court’s inquiry, but it did not make the standing concern go away. An “injury-in-fact” must be *both* actual or imminent *and* concrete and particularized.⁸³ Therein lied a potential rub. Demonstrating that the injury from climate change satisfied one prong of this standard would necessarily make it more difficult to satisfy the other. Insofar as anthropogenic emissions of greenhouse gases have already warmed the atmosphere, it is exceedingly difficult (if not impossible) to identify specific environmental changes that have occurred as a result of the human contribution to climatic warming with any degree of certainty. Identifying specific harms that will (or are at least quite likely to)

⁷⁹ See *Massachusetts*, 549 U.S. at 541 (Roberts, C.J., dissenting) (“The very concept of global warming seems inconsistent with [the] particularization requirement.”).

⁸⁰ *Id.* at 522.

⁸¹ *Id.* at 521–22 (summarizing affidavits).

⁸² *Id.*

⁸³ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

occur in specific places requires a resort to computer models that seek to project likely impacts from the human contribution to global warming in the decades ahead. So the injury is made concrete and particularized at the expense of its imminence. Again, this is not to deny the existence of anthropogenic global warming, but only to recognize that climate scientists have not yet been able to attribute specific environmental phenomena in specific places to human contributions to global warming, and this complicates efforts to demonstrate Article III standing.

In order to show that its injury was concrete and particularized, Massachusetts focused on sea-level rise, as the loss of state sovereign territory would certainly be a tangible harm of the sort Article III demands. Yet as already suggested, the problem for Massachusetts was that in order to identify a specific loss of its own land from human-induced global warming with any particularity, it was forced to rely upon model projections far into the future. Specifically, Massachusetts focused on the potential loss of coastline due to sea-level rise “by 2100.”⁸⁴ Focusing on this sort of future injury enabled Massachusetts to identify a specific harm particular to it, but at the expense of its ability to claim any such harm was occurring here and now, and was thus “actual or imminent” as the Court’s interpretation of Article III requires. Under the pre-existing case law, assertion of a future injury would not suffice. Yet had Massachusetts focused on the effects of greenhouse gas emissions already underway, it would have been forced to assert injury from a modest change in global atmospheric temperature, and little else.⁸⁵ Doing so would have meant abandoning any claim that the injury Massachusetts suffered was concrete and particular to its interests as a state.

While purporting to adhere to the traditional test for standing articulated in *Lujan v. Defenders of Wildlife*,⁸⁶ the Court took two steps to ease Massachusetts’s legal burden, each of which constitutes a potentially significant change in the law of standing.⁸⁷ First, and most conspicuously, the Court declared that it was “of considerable

⁸⁴ See *Massachusetts*, 549 U.S. at 523 n.20 (discussing “possible” effects of rising sea levels over the next century).

⁸⁵ According to the Intergovernmental Panel on Climate Change (IPCC), the best estimate for sea-level rise attributable to the human contribution to global warming is 3.5–8cm over the entire twentieth century. See INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2001: THE SCIENTIFIC BASIS 665 (J.T. Houghton et al. eds., 2001), available at http://www.grida.no/publications/other/ipcc_tar/?src=/climate/ipcc_tar/wg1/426.htm#fig1110.

⁸⁶ 504 U.S. 555 (1992).

⁸⁷ It is certainly possible that the Court could have found that Massachusetts had standing within the traditional confines of the injury-in-fact requirement, perhaps by relying on the sheer enormity of the threat posed by global climate change, but this is not the course that the Court opted to take.

relevance” that the petitioner was “a sovereign State and not, as it was in *Lujan*, a private individual.”⁸⁸ This was relevant because “[s]tates are not normal litigants for the purposes of invoking federal jurisdiction.”⁸⁹ Having ceded a portion of their sovereign authority to the federal government, the Court announced, the Commonwealth of Massachusetts and other states were entitled to “special solicitude” when seeking to invoke the jurisdiction of federal courts.⁹⁰ With this newfound solicitude “in mind,” the Court had little difficulty concluding that a miniscule increase in sea-level rise satisfied the injury-in-fact requirement.⁹¹

The majority purported to justify its newfound “special solicitude” for states in *Georgia v. Tennessee Copper Co.*,⁹² a century-old case in which the state of Georgia brought a federal common law nuisance suit against a polluting factory from across the border in Tennessee.⁹³ This case had nothing to do with standing, however. Rather, it was a suit under the federal common law of interstate nuisance—a suit of the sort that would almost certainly be preempted today under the Clean Air Act.⁹⁴ The only “special solicitude” shown to Georgia in

⁸⁸ *Massachusetts*, 549 U.S. at 518.

⁸⁹ *Id.* at 518.

⁹⁰ *Id.* at 520.

⁹¹ The majority grounded Massachusetts’s injury in the claim that “global sea levels rose somewhere between 10 and 20 centimeters over the 20th century as a result of global warming.” *Id.* at 522.

The “unchallenged” affidavit the opinion cites for this proposition is more circumspect, however, claiming only that anthropogenic warming caused “major” contributions to this observed sea-level rise. See MacCracken Decl. ¶5(c), J. App. at 225, *Massachusetts*, 549 U.S. 497 (No. 05-1120).

The IPCC, which purports to represent the scientific consensus on global climate change, attributes a minority of observed sea-level rise to human activities and has largely refrained from attributing specific amounts of sea-level rise in specific places to anthropogenic climate forcing. See INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, *supra* note 85, at 665; see also Posting of Roger Pielke, Jr. to Prometheus Blog, *A Few Comments on Massachusetts v. EPA*, http://sciencepolicy.colorado.edu/prometheus/archives/climate_change/001160a_few_comments_on_ep.html (Apr. 2, 2007).

In any event, the amount of sea-level rise that constitutes Massachusetts’s actual, present injury is less than 0.1cm–0.2cm per year, and the amount of projected sea-level rise that could be redressed by regulation of greenhouse gas emissions from new motor vehicles under Section 202 is even less, as U.S. motor vehicles only represent a fraction of GHG emissions.

⁹² 206 U.S. 230 (1907).

⁹³ *Id.* at 236.

⁹⁴ See *City of Milwaukee v. Illinois*, 451 U.S. 304, 318–19 (1981) (holding that the Clean Water Act preempts interstate nuisance claims for water pollution under federal common law); see also Robert V. Percival, *The Clean Water Act and the Demise of the Federal Common Law of Interstate Nuisance*, 55 ALA. L. REV. 717, 768 n.476 (2004) (“Although the Supreme Court has not directly addressed the question of whether the federal Clean Air Act preempts federal common law in disputes over transboundary air pollution, it is widely assumed to do so, particularly in light of the Clean Air Act Amendments of 1990, which created a comprehensive federal permit scheme similar to that established by the Clean Water Act.”). But see *Connecticut v. Amer. Elec. Power*, 582 F.3d 309 (2nd Cir. 2009) (rejecting claim that Clean Air Act

the case was the Court's willingness to consider providing Georgia with equitable relief of the sort unavailable to private parties under federal common law due to the state's "quasi-sovereign" interest in its territory.⁹⁵ Yet it is one thing to hold that one state cannot foul the air of its neighbor and that state parties can pursue extraordinary equitable relief in federal court. It is quite another to maintain that a state's ability to vindicate such a claim on behalf of its citizens gives rise to a "special solicitude" when a state sues in federal court to invoke the regulatory apparatus of administrative agencies.

On any fair reading, *Georgia v. Tennessee Copper* provides little, if any, support to the majority's newfound doctrine of "special solicitude." This may explain why the case was not cited in Massachusetts's briefs. Indeed, the case was not cited in *any* brief filed by *any* party or amicus in the case.⁹⁶ While one brief filed by state *amici* did argue that states have special interests that should be taken into consideration as part of the standing analysis, it focused on the potential for federal law to preempt state regulatory initiatives.⁹⁷

preempts suit alleging greenhouse gases contribute to public nuisance of global warming).

⁹⁵ *Georgia*, 206 U.S. at 237.

⁹⁶ The first appearance of the case came during oral argument, when it was raised by Justice Kennedy:

JUSTICE KENNEDY: What's your authority for that? I have the same question as the Chief Justice. I was looking at your brief for the strongest case. Suppose there were a big landowner that owned lots of coastline. Would he have the same standing that you do or do you have some special standing as a State, and if so what is the case which would demonstrate that?

MR. MILKEY: Well, Your Honor, first of all, we agree that a large landowner would himself or herself have—

JUSTICE SCALIA: Or even a small landowner?

JUSTICE KENNEDY: No, no. I'm asking whether or not you have some special—

MR. MILKEY: Yes—

JUSTICE KENNEDY:—standing as a State and, if so, what the authority for that is?

MR. MILKEY: Your Honor, first of all, I do think we have special standing. For example, here it's uncontested that greenhouse gases are going to make ozone problems worse, which makes it harder for us to comply with our existing Clean Air Act responsibilities.

And the—in the West Virginia case, which is a D.C. Circuit case, the Court found that that itself provided an independent source of standing. In terms of Supreme Court cases, the—it's been—for 200 years, this Court has recognized loss of State sovereign property as a traditional—

JUSTICE KENNEDY: Well, I don't know. 1907 was *Georgia versus Tennessee Copper*, and that was pre-Massachusetts versus Mellon. That seems to me your best case.

Transcript of Oral Argument at 14–15, *Massachusetts*, 549 U.S. 497 (No. 05-1120).

⁹⁷ See Brief of the States of Arizona et al. as Amici Curiae in Support of Petitioners at 15–25, *Massachusetts*, 549 U.S. 497 (No. 05-1120), 2006 WL 2563380. For a critique of these

Even those who believe states should receive such consideration recognize the Court's reasoning on this point was quite confused.⁹⁸

Recognizing a "special solicitude" for sovereign states was the *Massachusetts* Court's first revision to the law of standing. Its expansion of what constitutes a "procedural right" that would justify relaxing the traditional standing requirements of causation and redressability was the second. According to the Court, it was "of critical importance" that Congress had "authorized this type of challenge to EPA action."⁹⁹ As the Court had noted in *Lujan*, the "normal standards for redressability and immediacy" are relaxed when a statute vests a litigant with "procedural rights."¹⁰⁰ This is because, as Justice Kennedy explained in *Lujan*, "'Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before.'"¹⁰¹ However, as the *Massachusetts* Court noted (again citing Justice Kennedy's *Lujan* concurrence), "'In exercising this power . . . Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit.'"¹⁰² Therefore, the Court could relax the "normal standards for redressability and immediacy" so long as Congress identified the injury it sought to vindicate and the related the injury to those entitled to bring suit. Yet Congress never did anything of the kind.

The only congressional enactment cited by the Court as a justification for easing standing's traditional redressability and immediacy requirements was Section 307(b)(1) of the Clean Air Act. Here, according to the Court, is where Congress had "authorized this type of challenge to EPA action." This was an innovative reading of the Clean Air Act. Up until *Massachusetts*, Section 307(b)(1) had been recognized as little more than a jurisdictional provision, identifying which petitions for review of EPA action under the Clean Air Act must be filed in the U.S. Court of Appeals for the D.C.

alternative arguments for state standing, see Brief of the Cato Institute and Law Professors Jonathan H. Adler, James L. Huffman, and Andrew P. Morriss as Amici Curiae in Support of Respondents at 14–17, *Massachusetts*, 549 U.S. 497 (No. 05-1120), 2006 WL 3043962.

⁹⁸ See Kathryn A. Watts & Amy J. Wildermuth, *Massachusetts v. EPA: Breaking New Ground on Issues Other Than Global Warming*, 102 NW. U. L. REV. COLLOQUY 1, 8 (2007), <http://www.law.northwestern.edu/lawreview/Colloquy/2007/17/LRColl2007n17Watts.pdf> (noting "confusion" about the nature of *Massachusetts*'s sovereign interest in the case).

⁹⁹ *Massachusetts*, 549 U.S. at 516 (citing 42 U.S.C. § 7607(b)(1)).

¹⁰⁰ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 n.7 (1992).

¹⁰¹ *Massachusetts*, 549 U.S. at 516 (quoting *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring)).

¹⁰² *Id.* at 516 (quoting *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring)).

Circuit as opposed to regional circuit courts of appeals.¹⁰³ By its terms, this provision does not create a new procedural right, let alone “identify” an injury and “relate the injury to the class of persons entitled to bring suit.”¹⁰⁴ The underlying right to review agency action is found in the Administrative Procedure Act, not Section 307 of the Clean Air Act.¹⁰⁵ Indeed, the Clean Air Act contains a citizen suit provision of its own that is virtually identical in every meaningful respect to the Endangered Species Act provision found not to create such a right in *Lujan*.¹⁰⁶

In *Lujan*, the Court held that the Endangered Species Act’s conferral of the right of “any person . . . to enjoin” any federal agency “alleged to be in violation” of the Act was insufficient to create a procedural right, the violation of which would satisfy the requirements of standing.¹⁰⁷ Such a provision, Justice Kennedy explained, “does not of its own force establish that there is an injury in ‘any person’ by virtue of any ‘violation.’”¹⁰⁸ Yet if this is so, it is hard to conceive how a jurisdictional provision such as Section 307, which by its own terms does not impose any obligations on the EPA nor confer any express rights, does anything more to establish the existence of a judicially-cognizable injury. If the Court is to be taken at its word, *Massachusetts* effects a remarkable shift in administrative law by greatly expanding the class of statutes that should now be recognized as the source of procedural rights that justify loosening the causation and redressability requirements for standing.¹⁰⁹

Having found a justification for loosening the causation and redressability requirements, the Court had little problem concluding that these requirements had been met. While citing the longstanding rule that a favorable decision must “‘relieve a *discrete injury*’” to the

¹⁰³ See 42 U.S.C. § 7607(b)(1) (2000) (providing, in pertinent part, that “[a] petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard . . . or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia.”).

¹⁰⁴ *Massachusetts*, 549 U.S. at 516 (quoting *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring)); see Ronald A. Cass, *Massachusetts v. EPA: The Inconvenient Truth About Precedent*, 93 VA. L. REV. IN BRIEF 75, 79–80 (2007), <http://www.virginialawreview.org/inbrief/2007/05/21/cass.pdf>.

¹⁰⁵ See Cass, *supra* note 104, at 80.

¹⁰⁶ See 42 U.S.C. § 7604 (2000). This provision was not at issue in *Massachusetts v. EPA*.

¹⁰⁷ See *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring) (quoting 16 U.S.C. § 1540(g)(1)(A)) (ellipsis in original).

¹⁰⁸ *Id.* (quoting 16 U.S.C. § 1540(g)(1)(A)).

¹⁰⁹ It is also possible that this portion of the Court’s holding will be abandoned in subsequent cases. The Supreme Court is often criticized for its erratic application of administrative law principles. See generally Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don’t Get It*, 10 ADMIN. L.J. AM. U. 1 (1996).

plaintiff, the majority held that any government action that, all else equal, reduces (or at least retards the growth of) global emissions of greenhouse gases by any amount will suffice to redress some portion of the warming-induced injury.¹¹⁰ After all, Justice John Paul Stevens explained, “A reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere.”¹¹¹ And this, in turn, would have *some* effect on future projections of sea-level rise—even if only by less than one inch between now and 2100. Under this loosened standard, *any* contribution of *any* size to a cognizable injury would be sufficient for causation, and *any* step, no matter how small, is sufficient to provide the necessary redress.

The *Massachusetts* majority’s expansive approach to standing prompted a strongly worded dissent from Chief Justice Roberts.¹¹² While accepting that “[g]lobal warming may be a ‘crisis,’ even ‘the most pressing environmental problem of our time,’”¹¹³ the Chief Justice concluded that such global environmental concerns were not amenable to resolution in federal courts. The Chief Justice accused the majority of abandoning “judicial self-restraint” and adopting an “utterly manipulable” approach to the Article III standing requirements in its effort to prop open the courthouse doors for climate change plaintiffs.¹¹⁴ *Massachusetts*, in his view, resurrected the “high-water mark of diluted standing requirements, *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*,” a case that stretched the bounds of Article III.¹¹⁵ *Massachusetts*, Roberts intoned “is *SCRAP* for a new generation.”¹¹⁶

The Court may appear to have taken a slight step back from *Massachusetts*’ permissive approach to standing in *Summers v. Earth Island Institute*,¹¹⁷ decided shortly after this Symposium was held. Here, a 5–4 Court rejected environmentalist groups’ efforts to challenge revised procedures the U.S. Forest Service adopted to

¹¹⁰ *Massachusetts v. EPA*, 549 U.S. 497, 525 (2007) (quoting *Larson v. Valente*, 456 U.S. 228, 244 n.15 (1982)) (emphasis added).

¹¹¹ *Id.* at 526.

¹¹² *See id.* at 535–49 (Roberts, C.J., dissenting).

¹¹³ *Id.* at 535 (quoting Petition for Writ of Certiorari at 22, 26, *Massachusetts*, 549 U.S. 497 (No. 05-1120), 2006 WL 558353).

¹¹⁴ *Id.* at 548. This “effort” appears to have been successful insofar as federal appellate courts have found private plaintiffs to have had standing in subsequent climate change cases. *See Connecticut v. American Elec. Power Co., Inc.*, 582 F.3d 309 (2nd Cir. 2009) (state and private plaintiffs have standing for alleged harms from climate change); *Comer v. Murphy Oil USA*, 585 F.3d 855 (5th Cir. 2009) (same), *reh’g en banc granted*, 2010 WL 685796 (5th Cir. Feb. 26, 2010). *But see Kivalina v. ExxonMobil Corp.*, 663 F.Supp.2d 863 (N.D.Cal. 2009) (rejecting standing).

¹¹⁵ *Id.* at 547.

¹¹⁶ *Id.* at 548.

¹¹⁷ 129 S. Ct. 1142 (2009).

streamline timber removal on small parcels affected by forest fires.¹¹⁸ Specifically, the Court held that environmentalist plaintiffs lacked standing to challenge revisions to U.S. Forest Service regulations governing relatively small fire-rehabilitation and timber-salvage projects absent an injury tied to the application of these rules to a specific project. While this was an unwelcome decision for environmentalist groups, it was neither much of a surprise nor a significant change in the law of standing.

Summers arose when several environmentalist groups filed suit against the U.S. Forest Service for failing to provide adequate notice and comment for a timber salvage sale, the Burnt Ridge project, covering 238 acres of fire-damaged timber in the Sequoia National Forest.¹¹⁹ According to the Forest Service, salvage projects of this sort were exempt from the otherwise applicable statutory notice and comment requirements.¹²⁰ The environmentalist groups countered that this exclusion was illegal, and sought a nationwide injunction to prevent the Forest Service from exempting any such projects from its procedural rules.

The environmentalist groups unquestionably had standing to file their initial suit. They were challenging the Forest Service's actions with regard to a specific project at a location frequently used by at least one of their members.¹²¹ Yet standing to challenge federal agency rules as applied to a specific project does not confer standing to challenge the same agency's rules in the abstract—and that is where the plaintiffs' problems emerged.

The environmentalist plaintiffs quickly prevailed in their initial suit. They obtained a district court injunction against the Burnt Ridge project, prompting the federal government to settle the case.¹²² At this point, according to the District Court, the Burnt Ridge project was no longer an issue in the case,¹²³ and yet the environmentalist groups sought to press their claims against the Forest Service's policy of excluding small timber salvage projects from the otherwise applicable procedural rules.

¹¹⁸ *Id.* at 1147, 1151.

¹¹⁹ *Id.* at 1147–48.

¹²⁰ *Id.* at 1147; *see also* 36 C.F.R. §§ 215.4(a), 215.12(f) (providing that procedural requirements would not apply to forest projects categorically excluded from requirement of producing either an environmental impact statement or environmental assessment under the National Environmental Policy Act).

¹²¹ *Id.* at 1149 (describing affidavits).

¹²² *See* *Earth Island Inst. v. Pengilly*, 376 F.Supp.2d 994 (E.D.Cal. 2005); *Summers*, 129 S. Ct. at 1148.

¹²³ *Earth Island Inst.*, 376 F.Supp.2d at 999.

Writing for the Court, Justice Antonin Scalia explained that the plaintiffs no longer had standing to challenge the Forest Service's policy once they had settled their claims concerning the application of the policy to the Burnt Ridge project. This was the only specific project the plaintiffs had ever identified for which the application of the Forest Service policy would cause them a judicially cognizable injury.¹²⁴ Without the prospect of an injury resulting from the Burnt Ridge sale, plaintiffs could no longer claim standing to challenge "the regulation in the abstract," as they could no longer identify "any concrete application that threatens imminent harm to [their] interests."¹²⁵ Although Congress sought to provide prospective plaintiffs with a procedural right to file comments on proposed projects, plaintiffs did not have standing to vindicate such rights because they were unable to identify "some concrete interest that is affected by the deprivation."¹²⁶

Writing in dissent, Justice Stephen Breyer did not challenge the majority's application of the traditional standing requirements so much as he sought to explain why a more permissive test should apply. So, for example, Justice Breyer "concede[d] that the Court sometimes used the word 'imminent'" when enumerating the constitutional requirements of Article III standing, but argued that this should be understood only to preclude standing for "'conjectural' or 'hypothetical' or otherwise speculative" harms.¹²⁷ If any alleged harm would occur at some unidentified future date, in an undetermined location, Justice Breyer argued, there should still be standing where there is a "*realistic likelihood*" that the plaintiff would suffer harm from the government's future conduct.¹²⁸ Under this rule, the plaintiffs would have standing as there was a "realistic likelihood" that one or more members of the plaintiff environmentalist organizations would suffer an injury from the future application of the Forest Service policy to various salvage projects throughout the national forests. As Justice Breyer explained, "a threat of future harm

¹²⁴ *Summers*, 129 S. Ct. at 1150 (noting plaintiffs' "failure to allege that *any* particular timber sale or other project claimed to be unlawfully subject to the regulations will impede a specific and concrete plan . . . to enjoy the National Forests").

The plaintiffs did submit additional affidavits filed after the district court's decision. The Court did not consider whether these "late-filed" affidavits alleged facts sufficient to support standing as there was no rule or precedent to support the consideration of such material "after the trial is over, judgment has been entered, and a notice of appeal has been filed." *Id.* at 1153 (emphasis omitted); see also *id.* at 1150 n.*.

¹²⁵ *Summers*, 129 S.Ct. at 1150.

¹²⁶ *Id.* at 1151.

¹²⁷ *Id.* at 1155 (Breyer, J., dissenting).

¹²⁸ *Id.* at 1155-56.

may be realistic even where the plaintiff cannot specify precise times, dates, and GPS coordinates.”¹²⁹

Whatever the merits of Justice Breyer’s preferred approach, it departs significantly from the standing for injury-in-fact articulated in *Lujan* and reiterated in cases since. The plaintiffs in *Lujan* were also environmentalist organizations with many members with an undisputed interest in the preservation of endangered species. As a consequence, there was a “reasonable likelihood” that one or more members of the plaintiff groups would have suffered a harm from the challenged policy in the future, insofar as it would have allowed the federal government to fund projects that could destroy endangered species habitat overseas. Yet the *Lujan* court required more. Harms that would occur “someday” in the future were not enough, however reasonably likely they might have been. In other words, under *Lujan*, plaintiffs were required to identify a time, date, or GPS coordinate where the harm would occur. To grant plaintiffs standing in *Summers* would have been to loosen the strictures adopted in *Lujan*.

The Court narrowly rejected the standing of another interest group plaintiff in *Hein v. Freedom from Religion Foundation, Inc.*¹³⁰ The Freedom from Religion Foundation (“FRF”) alleged the Bush Administration’s Office of Faith-Based and Community Initiatives violated the First Amendment’s Establishment Clause by hosting conferences at which speakers used excessively religious imagery and suggested that faith-based programs might be more effective at delivering social services than secular entities because of their religious orientation.¹³¹

Substantively, FRF’s claim was always a bit of a stretch under existing precedent.¹³² The standing claim was not much stronger. As already noted, taxpayer standing is generally disfavored. A plaintiff’s status as a taxpayer, without more, is an insufficient basis for Article III standing. As the Court noted in *Hein*, “if every federal taxpayer could sue to challenge any Government expenditure, the federal courts would cease to function as courts of law and would be cast in the role of general complaint bureaus.”¹³³

FRF sought to avoid this general bar to taxpayer standing by relying upon *Flast v. Cohen*.¹³⁴ In *Flast*, the Supreme Court

¹²⁹ *Id.* at 1156.

¹³⁰ 127 S. Ct. 2553, 2559 (2007).

¹³¹ *Id.* at 2559.

¹³² See Ira C. Lupu & Robert W. Tuttle, *Ball on a Needle: Hein v. Freedom from Religion Foundation, Inc. and the Future of Establishment Clause Adjudication*, 2008 BYU L. REV. 115, 116 (stating that case was a “lawsuit destined to go nowhere”).

¹³³ *Hein*, 127 S. Ct. at 2559.

¹³⁴ 392 U.S. 83 (1968); see *Hein*, 127 S. Ct. at 2565.

recognized a narrow exception to the general rule against taxpayer standing for a subset of Establishment Clause cases.¹³⁵ Specifically, the Court allowed a taxpayer to challenge federal grants to religious schools under the Elementary and Secondary Education Act of 1965 because “the Establishment Clause . . . specifically limit[s] the taxing and spending power” under Article I, Section 8 of the Constitution.¹³⁶

The problem for FRF was that the Court had long construed the *Flast* exception in a stingy fashion. *Flast* was an anomaly in the jurisprudence of taxpayer standing that had “already been limited strictly to its facts” by 1983.¹³⁷ In nearly all of the Court’s subsequent cases, the Court read *Flast* quite narrowly.¹³⁸ Unless a specific case rested on all fours with *Flast*, the Court was almost certain to reject taxpayer standing.¹³⁹ In order to demonstrate standing, taxpayers were required to establish a nexus between their status as taxpayers and the specific use of the Article I, Section 8 spending power through a specific legislative enactment.¹⁴⁰ As the Court explained in *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*,¹⁴¹ *Flast* “limited taxpayer standing to challenges directed ‘only [at] exercises of congressional power’” under the taxing and spending power.¹⁴² Thus, the Court found taxpayer standing in *Tilton v. Richardson*¹⁴³ and *Bowen v. Kendrick*,¹⁴⁴ but not in other post-*Flast* cases.

This distinction between legislative and executive acts proved fatal to FRF’s claims. Because Congress never enacted legislation explicitly funding or approving the Office of Faith-Based and Community Initiative actions FRF sought to challenge, FRF could not avail itself of the *Flast* exception for taxpayer standing. In his opinion for the Court, Justice Alito repeatedly stressed that *Flast* had only concerned challenges of legislatively-authorized spending, and

¹³⁵ *Flast*, 392 U.S. at 105–06.

¹³⁶ *Id.* at 105.

¹³⁷ See Scalia, *supra* note 18, at 898. It is also worth noting that *Flast* was perhaps the last case to explicitly reject a separation-of-powers rationale for standing. See *id.* at 897 (citing *Flast*, 392 U.S. at 100–01).

¹³⁸ See Lee Epstein et al., *supra* note 43, at 664 (explaining that the Burger, Rehnquist, and Roberts Courts have all narrowly construed *Flast*); see also Nancy C. Staudt, *Modeling Standing*, 79 N.Y.U. L. REV. 612, 628 (2004) (“In the years following *Flast*, the Court embarked on a process of limiting the federal taxpayer standing doctrine.”).

¹³⁹ Staudt, *supra* note 138, at 628–29 (discussing various decisions that narrowly construed *Flast*); see also Epstein et al., *supra* note 43, at 664 (“Unless the dispute was a near-carbon copy of *Flast*, they almost never granted standing.”).

¹⁴⁰ See, e.g., *Bowen v. Kendrick*, 487 U.S. 589, 620 (1988).

¹⁴¹ 454 U.S. 464 (1982).

¹⁴² *Id.* at 479 (alteration in original) (quoting *Flast v. Cohen*, 392 U.S. 83, 102 (1968)).

¹⁴³ 403 U.S. 672 (1971).

¹⁴⁴ 487 U.S. 589 (1988).

declined FRF's invitation to expand taxpayer standing for Establishment Clause challenges to discrete Executive Branch actions. Doing so, Justice Alito warned, would have authorized undue judicial intrusion into the workings of the Executive Branch.¹⁴⁵

Commentators were quite critical of *Hein*. Some alleged the Court "overturned years of precedent" with its decision.¹⁴⁶ Anthony Lewis charged the Court "covertly overruled earlier decisions . . . recognizing the standing of members of the public to challenge measures that assist religious activities."¹⁴⁷ Yet what is actually striking about *Hein* is how little it changed. Not only did the decision not overturn "years of precedent," it left standing the law of taxpayer standing in the Establishment Clause context, neither expanding nor contracting the *Flast* exception.

This is not a defense of *Hein*.¹⁴⁸ The legislative-executive distinction is not particularly satisfying. Indeed, six of the nine Justices joined opinions explicitly rejecting it. The four dissenters were happy with *Flast*, if only it could be expanded. They preferred to allow taxpayer challenges to alleged establishments of religion, whether by legislative or executive act.¹⁴⁹ Justice Scalia, joined by Justice Thomas, concurred separately to call for overruling *Flast* entirely and eliminating all taxpayer standing in Establishment Clause cases.¹⁵⁰ What these six justices had in common was a belief that the *Flast-Hein* distinction between legislative and other governmental acts is unprincipled and unsustainable.

While Justice Alito's opinion for the Court sought to closely track the contours of *Flast* as interpreted and applied in subsequent cases, it stopped short of defending the actual decision or its initial rationale. To the contrary, the Alito opinion criticized *Flast* for giving too little attention to separation of powers concerns.¹⁵¹ Of those Justices in the majority, only one—Justice Kennedy—was willing to say *Flast* was

¹⁴⁵ *Hein v. Freedom from Religion Found. Inc.*, 127 S. Ct. 2553, 2569–70 (2007). Justice Kennedy adopts this same argument in his concurrence. *Id.* at 2573 (Kennedy, J., concurring).

¹⁴⁶ See Stephanie Mencimer, *Supreme Court: Taking Care of Business*, MOTHER JONES, Jan. 25, 2008, <http://www.motherjones.com/politics/2008/01/supreme-court-taking-care-business>.

¹⁴⁷ Anthony Lewis, *The Court: How 'So Few Have So Quickly Changed So Much,'* THE N.Y. REV. OF BOOKS, Dec. 20, 2007, at 58, 59.

¹⁴⁸ For a brief argument that the separation of powers concerns identified by Justice Kennedy provide a stronger argument for standing in *Hein* than in *Massachusetts*, see Jonathan H. Adler, *God, Gaia, the Taxpayer, and the Lorax: Standing, Justiciability, and Separation of Powers after Massachusetts and Hein*, 20 REGENT U. L. REV. 175 (2008).

¹⁴⁹ *Hein*, 127 S. Ct. at 2584–86 (Souter, J., dissenting).

¹⁵⁰ See *id.* at 2573–74 (Scalia, J., concurring).

¹⁵¹ *Id.* at 2569 (plurality opinion).

“correct” and should be neither “called into question” nor expanded to cover additional circumstances.¹⁵²

However unsatisfying *Hein*’s resolution of the underlying standing claim may be, it did not constrict taxpayer standing. To the contrary, *Hein* explicitly left the law of taxpayer standing where it stood before the case was heard. However stingy the Court’s interpretation of *Flast* was in *Hein*, this was not the first case to confine *Flast* to legislative exercises of the taxing and spending power, and, if the Court’s composition remains stable (and Justice Kennedy does not change his mind), it may not be the last.

If *Hein* narrowly denied FRF’s standing, leaving the law of taxpayer standing in Establishment Clause cases in place, *Sprint Communications Co. v. APCC Services, Inc.* resolved an even more narrow question of first impression in favor of the party asserting standing.¹⁵³ *Sprint Communications* arose out of disputes between payphone operators and long-distance carriers over compensation that the latter owes the former for “dial-around” calls.¹⁵⁴ Under the federal Communications Act, long-distance carriers are obligated to compensate payphone operators for such calls.¹⁵⁵ If the compensation is not paid, payphone operators may sue long-distance carriers for the money owed.¹⁵⁶ Because litigation is expensive, payphone operators may assign their claims to “aggregators” who pursue the claims on their behalf, economizing on litigation costs by pursuing multiple claims simultaneously. In *Sprint Communications*, the question before the Court was whether an aggregator, APCC Services, could have standing to pursue dial-around call compensation claims even if the aggregator retained no financial interest in the litigation.¹⁵⁷

The Court held 5–4 that an aggregator’s lack of a direct stake in the outcome of the litigation did not preclude standing.¹⁵⁸ Justice Stephen Breyer explained for the majority that “history and precedent make clear that such an assignee has long been permitted to bring suit,” even if no prior case had so held.¹⁵⁹ Just because the aggregators file suit in their own name, and retain no stake in the

¹⁵² *Id.* at 2572 (Kennedy, J., concurring).

¹⁵³ 128 S. Ct. 2531, 2533 (2008).

¹⁵⁴ “Dial-around” calls occur when a customer uses an access code or toll-free number to directly access the long-distance communications carrier to bypass the payphone operator when making a long-distance call from a payphone. *Id.* at 2534.

¹⁵⁵ See 47 U.S.C. § 226 (2000); 47 C.F.R. § 64.1300 (2008).

¹⁵⁶ See *Global Crossing Telecomm., Inc. v. Metrophones Telecomm., Inc.*, 127 S. Ct. 1513, 1516 (2007).

¹⁵⁷ *Sprint Commc’ns*, 128 S. Ct. at 2533.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

outcome of the litigation,¹⁶⁰ the majority saw no reason to strictly enforce the traditional bar against asserting a third-party's claims, particularly given the long-standing history of recognizing suits by assignees in other contexts, such as in *qui tam* litigation.¹⁶¹ The majority further rejected the idea that firms had to use other means of aggregating claims—such as class actions—if the aggregation of assignments, as done by APCC Services, would be more efficient at resolving the payphone operators' claims.¹⁶²

The dissent, on the other hand, could find no case in which equivalent claims had been allowed to proceed, and saw no reason to open the courthouse door any further, even if only by an inch. Both history and common sense confirmed “[t]here is a legal difference between something and nothing,” Chief Justice Roberts wrote in dissent. So long as the aggregators “have nothing to gain from their lawsuit,” he continued, they lack standing to invoke the jurisdiction of federal courts.¹⁶³ Allowing relators or others to pursue claims in which they retain an interest, or for which they could receive a bounty, is one thing. Pursuit of a naked claim is something else. As Chief Justice Roberts explained, “An assignee who has acquired the bare legal right to prosecute a claim but no right to the substantive recovery cannot show that he has a personal stake in the litigation.”¹⁶⁴

The dueling opinions devoted extensive space—nearly fifty pages—to their respective positions. In the process the two opinions skirmished over obscure historical precedents and the meaning of a decades-old student note,¹⁶⁵ all to decide a rather narrow (and potentially insignificant) question of standing law that had not arisen before. Both majority and dissent agreed that “as a practical matter” a denial of standing could have been easily overcome, perhaps with payment of nominal reward for a successful suit.¹⁶⁶ If, as the majority claimed, standing could be assured with payment of “only a dollar or

¹⁶⁰ Under the arrangements at issue the aggregators would receive a set fee for pursuing the claims, and reassign any successful claims back to the payphone operators. *Id.* at 2534.

¹⁶¹ *Id.* at 2542.

¹⁶² *Id.* at 2544.

¹⁶³ *Id.* at 2549 (Roberts, C.J., dissenting).

¹⁶⁴ *Id.* at 2550.

¹⁶⁵ Michael E. Solimine, *Congress, Separation of Powers, and Standing*, 59 CASE W. RES. L. REV. 1023, at 1039–1041 (2009). The student note at issue was Comment, *The Real Party in Interest Rule Revitalized: Recognizing Defendant's Interest in the Determination of Proper Parties Plaintiff*, 55 CAL. L. REV. 1452 (1967). See *Sprint Commc'ns*, 128 S.Ct. at 2540 (majority opinion) (discussing note); *id.* at 2556 (Roberts, C.J., dissenting) (same).

¹⁶⁶ *Sprint Commc'ns*, 128 S. Ct. at 2544 (majority opinion); *id.* at 2553 (Roberts, C.J., dissenting).

two,”¹⁶⁷ the dissent was willing to assert “Article III is worth a dollar.”¹⁶⁸

In retrospect, the case may have been about even less than the Justices surmised. While the majority may have thought it was making it easier to vindicate assigned rights and adopt a lower-cost means of pursuing dial-around compensation claims, it now appears the holding may have been completely unnecessary. Back in the lower courts, the arrangement suddenly became moot. In subsequent proceedings before the U.S. Court of Appeals for the D.C. Circuit, APCC claimed a sufficient interest in its assigned claims to satisfy the dissenters’ standing requirements, despite its prior protestations to the contrary.¹⁶⁹ After the Supreme Court’s decision in *Sprint Communications*, APCC revealed that “in fact it does keep some, perhaps a substantial portion, of funds awarded for payphone compensation,” despite its prior claims to the contrary.¹⁷⁰ Had this been APCC’s position from the start, there would have been no question of its standing, and years of litigation could have been avoided. Thus, *Sprint Communications* may turn out to be a completely inconsequential case—at least for the specific dispute at issue. If the decision has any effect, however, it will be to lower the hurdles faced by litigants asserting Article III standing, even if only on the margin.

CONCLUSION

Any attempt to reach a definitive judgment about the Roberts Court at this early date is a perilous exercise. The Roberts Court is still a work in progress—a work that is likely to see significant change in the years ahead, with or without a change in the Court’s composition. In an effort to forecast such changes, commentators and academics rush to identify the Court’s early inclinations and foretell the likely road ahead. The temptation to offer tentative conclusions can be irresistible—a temptation to which this author and the other participants to this Symposium have succumbed.

Many commentators assert that the Roberts Court limited citizen access to federal courts in its first four terms. In some areas this may be true. In the case of Article III standing, however, it is not. Given Chief Justice Roberts’s prior writing, and demonstrated interest in

¹⁶⁷ *Id.* at 2544 (majority opinion).

¹⁶⁸ *Id.* at 2553 (Roberts, C.J., dissenting).

¹⁶⁹ *See* *NetworkIP, LLC v. Fed. Commc’ns Comm’n*, 548 F.3d 116, 120 n.2 (D.C. Cir. 2008).

¹⁷⁰ *Id.*; *see also id.* at 129 (Sentelle, J., concurring) (expressing “dismay” at APCC’s “bizarre conduct” and “sudden reversal” in position).

standing, one may expect federal jurisdiction to contract. Yet, as this Article has sought to show, if there has been any change in standing law on Chief Justice Roberts's watch, it has been in the opposite direction. If anything, the Roberts Court has expanded the realm of justiciable claims under Article III, the Chief Justice's opposition notwithstanding. In this respect, at least, the Roberts Court has increased access to the federal courts.

